89- 1477

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BRUNO AND JOAN FIGLIUZZI,
Petitioners,

v.

CITIBANK, N.A.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether a banking institution can be both issuer and beneficiary in a standby letter of credit transaction.

Whether a party is liable for attorney fees when a contract containing an attorney fee clause for enforcement and collection upon party's default, and the bulk of the attorney fees were not incurred to collect the sum owed, but incurred as a result of defending a good faith counterclaim.

Whether the bank breached its duty of good faith toward its borrowers.

Whether it was proper for the court to grant summary judgment.

PARTIES BELOW

Parties before the United States Court of Appeals for the Fourth Circuit were Bruno and Joan Figliuzzi as Appellants and Citibank, N.A. as Appellee.

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OPINIONS BELOW

The opinion of the Court of Appeals, not published, appears in the appendix hereto.

The orders of the United States District Court for the Eastern District of Virginia, Alexandria Division, not reported, also appears in the appendix hereto.

JURISDICTIONAL STATEMENT

Petitioner Bruno and Joan Figliuzzi respectfully pray that this writ of certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on December 22, 1989. This Court's jurisdiction is pursuant to 28 U.S.C. section 1254(1).

STATEMENT OF THE CASE

This is a suit by Citibank, N.A., against Bruno and Joan Figliuzzi to recover on a personal guaranty executed by them on December 22, 1983, as part of an Industrial Revenue Bond transaction.

On a motion by Citibank heard on October 23, 1987, the Court awarded summary judgment in favor of the plaintiff, Citibank, N.A., against the defendants, Bruno and Joan Figliuzzi, jointly and severally for the unpaid balance due on the Note and the fees owed for the issuance of the Letter of Credit, plus enforcement costs, including attorneys' fees, and left the issue of the amount of damages to be tried on November 2, 1987, the date on which the case was to be heard originally.

The Figliuzzis filed for bankruptcy and this matter was stayed and did not come back for hearing until January 3, 1989, at which time the Court heard testimony and argument of counsel, and again heard argument on Friday, January 27, and again on Monday, January 30. The Court entered judgment against the defendants on February 1, 1989, in the total amount of $2,594,997.81, comprising principal in the amount of $1,550,981.22, interest as of January 31, 1989, in the amount of $118,680.88, Letter of Credit fees as of January 31, 1989, in the amount of $234,881.07, and enforcement costs, including attorneys' fees, through December 31, 1988, in the amount of $690,454.64.

Bruno and Joan Figliuzzi appealed from the order granting summary judgment on the liability issues and from the judgment entered against them on February 1, 1989, and from an order denying them a jury trial.

On October 6, 1989, this matter came on for oral argument before the United States Court of Appeals for the Fourth Circuit. The Court of Appeals affirmed the lower Court's decision on December 22, 1989.

STATEMENT OF THE FACTS

On December 22, 1983, as part of an Industrial Revenue Bond transaction with LCS Homes, Inc., a corporation wholly owned by Mr. Figliuzzi, Bruno and Joan Figliuzzi signed a personal guaranty which guaranteed the repayment of a secured $6,000,000.00 note. The Industrial Revenue Bond (IRB), also referred to as the Note, was executed by the Industrial Development Authority of Stafford County, Virginia, to Madison National Bank as the lender and LCS Homes, Inc. as the borrower.

As an additional part of the transaction, Citibank simultaneously issued a standby, irrevocable, transferable Letter of Credit in the amount of $6,000,000.00 in favor of Madison National Bank for a fee, payable by LCS Homes, Inc., of 1½% of the unpaid balance on the Note. Also, LCS Homes, Inc., executed a reimbursement agreement that provided for reimbursement to Citibank by LCS Homes, Inc., of any funds paid by Citibank on the Letter of Credit which, inter alia, imposed obligations on Madison in event of default.

At least as early as February 6, 1984, less than two months after settlement on the IRB transaction, federal bank examiners declared the bond a loan and not an investment, that it exceeded Madison's lending limits, and that Madison must divest itself of the bond, and it so advised Citibank.

On March 4, 1985, Citibank purchased the Note from Madison without recourse, but chose to leave Madison as the beneficiary of the Letter of Credit. As of March 4, 1985, LCS Homes, Inc. was not in breach of its loan obligation.

LCS Homes, Inc., claimed that, as a result of Citibank's purchase of the Note, Citibank was no longer entitled to Letter of Credit fees.

LCS Homes, Inc. entered into a contract with a qualified purchaser, John Driggs, comprising three documents,

two dated December 20, 1985, and one, December 22, 1985, to sell to John Driggs the property securing Citibank, and 228 acres, more or less. Two of the provisions were that John Driggs would assume the position of LCS Homes, Inc., and Bruno and Joan Figliuzzi vis-a-vis Citibank, and Bruno and Joan Figliuzzi would be released from their guaranty.

On February 10, 1986, a meeting was held in the offices of the Driggs Corporation attended by Citibank through its representatives, Driggs and his representatives, and Bruno Figliuzzi for LCS Homes, Inc., to determine the conditions upon which Citibank would approve that contract. The negotiations resulted in an agreement between Citibank and Bruno Figliuzzi, and Citibank and Driggs. The agreement between Citibank and Bruno Figliuzzi provided that: (1) Bruno Figliuzzi and Joan Figliuzzi would be released from their guaranty; (2) LCS Homes, Inc. would provide a newly to-be-formed Driggs Company with $1,400,000.00; and (3) Bruno Figliuzzi would give a personal, unsecured shortfall guaranty, to come into play only after the other remedies were exhausted, in the amount of $500,000.00.

Citibank, after the February 10 meeting, reneged on and breached its agreement with Bruno Figliuzzi in that it wanted collateral, and then even more collateral, for the new Figliuzzi $500,000 guaranty; and the form of the consent agreement and proposed new guaranty proffered by Citibank (in April of 1986) to be executed by Bruno and Joan Figliuzzi did not comport with its agreement of February 10, 1986, in that the guaranty and consent agreements, inter alia, were not limited to $500,000.00 nor were they limited to the exhaustion of other remedies.

LCS Homes, Inc. did not make the May through October, 1986, payments on the note and, on November 3, 1986, LCS Homes, Inc., filed for protection under Chapter 11.

Citibank filed this action on December 5, 1986.

Bruno Figliuzzi and Joan Figliuzzi asserted counterclaims and affirmative defenses with respect to, among other things, improper letter of credit fees, bad faith, and failure to draw down on the letter of credit.

REASONS FOR GRANTING THE WRIT

I. WHETHER A BANKING INSTITUTION CAN BE BOTH ISSUER AND BENEFICIARY IN A STANDBY LETTER OF CREDIT TRANSACTION.

In the case at hand, Citibank is both issuing bank and beneficiary and as a result, Citibank has refused to draw down on the letter of credit. In an ordinary letter of credit transaction, the beneficiary would have drawn down on the letter of credit, Citibank, as issuer, would have had the obligation to pay the beneficiary, the letter of credit would have been terminated, and the letter of credit fees would have come to a halt. Even while you are reading this petition, Citibank continues to charge letter of credit fees to Mr. and Mrs. Figliuzzi without their receiving any benefit therefrom.

As issuer and beneficiary, Citibank is contracting with itself and as a result is absurdly asking for payment from itself. How can Citibank contract with itself? Why did Citibank refuse to draw down on the letter of credit? To continue collecting letter of credit fees.

The purpose and value of the standby letter of credit is illustrated in *Consolidated Aluminum Corp. v. Bank of Virginia*, 544 F. Supp. 386, 398 (D. Md. 1982), in which the court states, "The value of the letter of credit to the beneficiary is the certainty of payment upon compliance with the terms and conditions of the credit." In the case at hand, with Citibank as beneficiary and issuer, the value of the letter of credit is lost in that the beneficiary is not drawing down on the letter of credit. This is further highlighted in *Exxon Company, U.S.A. v. Banque de*

Paris, 828 F.2d 1121, 1122 (5th Cir. 1987), *cert. granted*, 108 S.Ct. 1572 (1988), vacated and remanded on other grounds, 109 S.Ct. 299 (1988), "Standby letters of Credit are issued by banks to assure the prompt payment of money to a party to another contract in the event that the other contract is not performed in accordance with its terms. The issuing bank is required to make payment only if it is presented with specified documents. The function of letters of credit requires that they be succinct and clear, for their utility lies in the assurance they provide that payment will be made on the specified terms without delay or litigation." For the market place, standby letters of credit are of vital importance in that they eliminate credit risks, and as a result reduce the cost of commercial transactions.

Another dilemma arises when a bank is both issuer and beneficiary, which is revealed in *Consolidated Aluminum Corp. v. Bank of Virginia*, 544 F. Supp. 386, 395 (D. Md. 1982), in which the court advises that "Nonpayment by the issuer gives rise to an action by the beneficiary for breach of contract in which the beneficiary must plead and prove due performance on his part." How can Citibank sue itself? It cannot; and, as a result, there is no one to ensure that Citibank performs its part of the bargain. In a standby letter of credit transaction, nobody should be permitted to be both beneficiary and issuer. It will only cause letter of credit transactions to be economically and commercially infeasible. This kind of deception will destroy the utility of the letter of credit in the commercial world in that the customer will eventually realize that banks are taking advantage of them by charging them ongoing letter of credit fees even though one easy step, drawing down on the letter of credit, would stop such charges.

The obligation to drawn down on the standby letter of credit is also addressed in *New Jersey Bank v. Palladino*, 389 A.2d 454, 464 (1978), "It is important to note, that

despite their similarities, the standby letter of credit is not a guarantee. Recovery under a guarantee is predicated upon the primary obligor's nonperformance in face of its guaranteed obligations. The guarantor is therefore only secondarily liable with respect to the same obligation of the primary obligor. Recovery under a standby letter of credit, on the other hand, requires only the presentation of the requisite documents (whether or not the applicant has in fact performed or even may legally perform, its obligations under the underlying agreement), and the issuer is primarily liable with respect to its obligations under the letter of credit (which obligations, needless to say, are different from those of the applicant under the underlying agreement)." Accordingly, the beneficiary had a duty to draw down on the standby letter of credit in order to receive its payment from the issuer who is primarily liable. The issuer is then entitled to payment under the reimbursement agreement, since the issuer is primarily liable and the guarantor only secondarily. As a result, Citibank had an obligation to draw down on the letter of credit, which would stop the letter of credit fees, and then go after the guarantors, if it so wished. It was incorrect to sue the guarantors without first drawing down on the letter of credit and continue to charge the fees. Citibank's practice is against public policy in that the customer continues to pay for letter of credit fees without deriving any benefit therefrom.

In *National Bank of North America v. Alizio*, 103 A.D. 2d 690, 477 N.Y.S. 2d 356 (1st Dept 1984), an institution was both the beneficiary and issuer in the same transaction. The question whether it was proper for this institution to be both issuer and beneficiary never was addressed in that the defendants could not demonstrate that, failing to issue drafts to itself, harmed the defendant's actions. But in the case at hand, Mr. and Mrs. Figliuzzi can illustrate that they were harmed in that they are being forced to continue to pay letter of credit fees even though they do not derive any benefit from it. In *National Bank*

of North America v. Alizio, 103 A.D. 2d 690, 477 N.Y.S. 2d 356 (1st Dept 1984), the bank was both issuer and beneficiary, and no problems arose because, even though it was standing in both shoes, it did what it was supposed to do, draw down on the letter of credit. In the case before this court, Citibank did not fulfill the obligations as it was supposed to do, in that Citibank refused to draw down on the letter of credit. It was not just a technicality to draw down on the letter of credit because Mr. and Mrs. Figliuzzi were continually being charged with letter of credit fees and suffered damages as a result.

The purpose of the standby letter of credit is to assist commercial transaction. Due to the fact that in this case the beneficiary and issuer is the same institution, instead of promoting commercial expediency, it encourages litigation. If banks like Citibank continue to be issuer and beneficiary in the same transaction, the viability of the standby letter of credit will be destroyed. This court needs to provide guidelines and set bounds to ensure that standby letters of credit are preserved. If the standby letter of credit is ill-utilized, as in this case, and litigation is proliferated, standby letters of credit will not be employed in commercial transaction and its effectiveness destroyed.

This position is supported in *East Girard Savings Association v. Citizens National Bank and Trust Company of Baytown*, 593 F.2d 598, 603 (5th Cir. 1979), in which the court supports the notion that the letter of credit be preserved, "The letter of credit is a unique device developed to meet specific needs of the marketplace. If the letter of credit is to retain its utility as a commercial instrument, the rights and duties of the issuer, the beneficiary, and the procurer must remain clear." If this court consents to a practice in which it is permissible for a bank to be both issuer and beneficiary, the whole commercial industry will be disrupted in that a banking institution will stand in two shoes at the same time. The immediate

consequences will be that banks such as Citibank will initiate a common practice of acting both as issuer and beneficiary taking advantage of their customers by charging exurbanite letter of credit fees without providing the certainty of payment bargained for. Customers will refuse to utilize standby letters of credit because they do not want to be taken advantage of, and in turn it will increase the cost of commercial transactions.

A Supreme Court ruling is needed in order to give direction which the Circuits can follow, ensuring uniformity in the law and preserving the integrity of the standby letter of credit, which is of vital importance to the economy. It seems impossible for the issuer and beneficiary to be one and the same entity in that they are at opposite end of the spectrum with different roles to fulfill.

II. WHETHER A PARTY IS LIABLE FOR ATTORNEY FEES WHEN A CONTRACT CONTAINING AN ATTORNEY FEE CLAUSE FOR ENFORCEMENT AND COLLECTION UPON PARTY'S DEFAULT, AND THE BULK OF THE ATTORNEY FEES WERE NOT INCURRED TO COLLECT THE SUM OWED, BUT INCURRED AS A RESULT OF DEFENDING A GOOD FAITH COUNTERCLAIM.

Mr. and Mrs. Figliuzzi entered into a Guaranty in which allegedly Mr. and Mrs. Figliuzzi were liable for all of Citibank's attorney fees. When entering into a contract or guaranty, a party does not expect to be liable for attorney fees in collecting the sum owed plus attorney fees in defending a good faith counterclaim. It seems reasonable that a contract provide for the borrowing party to be liable upon default for the collection efforts of its attorneys, but it seems unreasonable to force the borrowing party to also be liable for attorney fees in defending counterclaims. *Dodson v. Remco Enterprises, Inc.*, 504 F. Supp. 540 (E.D. Va. 1980). This writ of certiorari must be accepted to readdress the issue of attorney fees clarifying whether or not, when a contract gives the bank the

right to be reimbursed for attorney fees with respect to the collection and enforcement of a defaulted note, it is proper to charge attorney fees for the defense of a counterclaim to the borrower. It seems unconscionable to allow a bank to be reimbursed for their expenses and attorney fees with respect to expenses and fees relating to the defense of a good faith counterclaim. Once it is permissible for a party to charge attorney fees defending counterclaims, then individuals would be discouraged from bringing their just claims before a court. It is of vital importance for parties to be able to come forward through the means of the judicial system to correct wrongs. A bank operating in improper ways without that party being ab'e to bring a counterclaim in fear of being charged the bank's attorney fees, is unthinkable, and this judicial system must stop this sort of practice and injustices. The court system is here to prevent injustices, and if access is discouraged, then injustice will continue. The pertinent question is whether Citibank can charge the Mr. and Mrs. Figliuzzi with attorney fees with respect to Citibank defending the counterclaim. I cannot see how. This cannot be considered part of the collection of the Note.

III. WHETHER THE BANK BREACHED ITS DUTY OF GOOD FAITH TOWARD ITS BORROWERS.

The principle of good faith can be addressed either with respect to the law of contract or tort. According to The Restatement (Second) of Contracts in section 205, comment (d) it is pronounced, "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement". No real direction has been given by the courts as to how to apply this standard of good faith in commercial transaction in that a question arises whether it is more important to protect the freedom of contract or to protect parties from social injustice when banks utilize its institutional power to further its personal satisfaction. It seems that it is more important to prevent injustice, especially since banks have

become so powerful as to be able to just demand actions and expect the borrower to jump. Lender Liability and Good Faith, 68 Boston University Law Review, May '88, 653-680. This Court should reinforce the common law concept of good faith and stop the diverse decisions around the country. There is disagreement as to how far this good faith doctrine reaches. For example, in *Comunale v. Traders & General Ins. Co.*, 50 Cal.2d 654, 658, 328 P.2d 198, 200 (1958), in which the court said the following, neither party will "do anything which will injure the right of the other to receive the benefits of the agreement.", in this case having the obligation to draw down on the letter of credit. The situation in this case is similar to that of insurance cases because the borrower expects that the bank will perform pursuant to the terms of the contract. This is exemplified in *K-Mart v. Ponsock*, 732 P.2d 1364 (Nev. 1987) in which the court awarded punitive damages for tortious breach of the covenant of good faith and fair dealing. Just as the employee is dependent upon the employer for a means of survival, and, as a result, expects the employer to act in good faith, the borrower expects the bank to act in good faith with respect to a standby letter of credit, since the borrower is dependent that the standby letter of credit transaction is being fulfilled and executed as it was planned and as the documents reflect.

The bank acted arbitrarily, capriciously and ruthlessly by refusing to draw down on the standby letter of credit only to benefit itself and injure the other party in this case, Mr. and Mrs. Figliuzzi. Banks have developed the attitude that they are so powerful that they are permitted to control and domineer without having to account for their actions. Presently, there are no guidelines concerning the bounds of permissible actions, conduct and practice. In order to ensure that this court system supports fair commercial dealings, contracts and behavior, it is necessary that the United States Supreme Court provide the banking community with bounds as to what is permissible conduct. Public policy demands that law and

the Supreme Courts' decision promote fairness and certainty in commercial lending and banking transactions. A body of coherent principles and rules must be announced by this court and this Writ of Certiorari will initiate the beginning of case law directing commercial practices and transactions. Lenders must be made aware that there are boundaries as to what is permissible in their practices and procedures. *Lender Liability and Good Faith*, 68 Boston University Law Review May '88 653-680, addresses the unreasonable practice of lenders and the necessity of implementing the good faith duty onto the lender to ensure that the lender is forced to act reasonable and fairly. Lenders have become cut throat in enforcing their rights. Sure, in this case it is suggested by Citibank that Mr. Figliuzzi is experienced, but it seems very suspicious to believe that both parties had equal bargaining power because if both parties had equal bargaining power, why did Mr. Figliuzzi execute an all encompassing guaranty, as was executed by him. In addition to demanding Mr. and Mrs. Figliuzzi to execute an all encompassing guaranty, Citibank does not even fulfill its obligation as it contracted to do. How can any court which is fair and which looks out for public policy permit a banking institution to demand its rights under the documents which are in effect but then does not demand of Citibank to perform its obligations under the said documents (i.e. to draw down on the standby Letter of Credit). This Court must ensure that public policy is fair, and, as a result, it is necessary for this court to accept this Writ of Certiorari to ensure fairness in commercial banking transactions. In the article *Lender Liability and Good Faith*, 68 Boston University Law Review May '88 653-680 the following is said; "Under the typical loan agreement, an event of default gives the lender the right to declare the loan immediately due. This right, however, is not absolute; if the lender is not in jeopardy of losing the 'benefit of its contractual bargain,' it may violate the implied obligation of good faith and fair dealing if it demands full repayment of the

loan." *Brown v. Avemco Inv. Corp.*, 603 F.2d 1367, 1375-76, 1380 (9th Cir. 1979), *Sahadi v. Continental Ill. Nat'l Bank & Trust Co.*, 706 F.2d 193, 199 (7th Cir. 1983). In addition, it seems possible that if a lender and borrower are trying to negotiate a settlement then exerts more coercive rights, as was in this case, then the bank may have violated the duty of good faith which it owes to the borrower. This is especially prevalent in this case in that the loan officer involved had, and still has, a personality conflict with the borrower; and, as a result, Citibank's actions were deliberate due to this personality conflict. The purpose was to harm the borrower, which is illustrated by Citibank's failure to draw down on the standby Letter of Credit. The harmfulness of these personality conflicts are expressed in *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 761 (6th Cir. 1985) and *State Nat'l Bank v. Farah Mfg. Co.*, 678 S.W. 2d 661, 686 (Tex. Ct. App. 1984). Citibank should have substituted loan officers to ensure that negotiations of settlement would have been performed in good faith. In addition, there is law which limits the use of unconscionable terms in contracts and controls the abuse of bargaining power by one party over another. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965). *Jones v. Star Credit Corp.*, 298 N.Y.S.2d 264, 265 (1969). In the present case, the guaranty is believed to be unconscionable, but if this court decides that the guaranty will stand as being a reasonable document, then this court must demand that in order for Citibank to rely on the terms of the Guaranty, it must perform the obligations it is required to perform and cannot refuse to draw down on the standby Letter of Credit.

It is necessary to construct case law to ensure that fairness is a component of commercial transactions and to ensure that lenders do not harm, especially unjustly as in this case, by continuing to charge the letter of credit charges and the exorbitant attorney fees. Lenders must be held accountable for their actions. In *Lender Liability*

and Good Faith 68 Boston University Law Review May '88 653,670, the lack of a clear standard is questioned and the reasons for setting a policy; "The extension of implied obligation to the lender borrower relationship, however, will actually be an effective deterrent to bank misbehavior and should improve the efficiency with which lenders serve their customers. The doctrine of lender liability has made the banking industry aware that it has a responsibility to treat its customers with fairness."

IV. WHETHER IT WAS PROPER FOR THE COURT TO GRANT SUMMARY JUDGMENT.

The Fourth Circuit was incorrect in affirming the District Court's decision granting summary judgment. In its decision, the Fourth Circuit quotes the following language that summary judgment "should be granted in cases 'where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law,' " but the decision of the Fourth Circuit neglects to finish the quote. The quote is, "but it should be granted only where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law. See *Westinghouse Electric Corp. v. Bulldog Electric Products Co.*, 4 Cir., 179 F.2d 139, 146; *Wexler v. Maryland State Fair*, 4 Cir., 164 F.2d 477. And this is true even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom." *Stevens v. Howard D. Johnson Co.*, 181 F.2d 390, 394 (4th Cir. 1950).

The Fourth Circuit in its decision quotes language out of *Little Beaver Enterprises v. Humphreys Railways, Inc.*, 719 F.2d 75, 79 (4th Cir. 1983) but neglects to finish the thought of the court. "The trial court, as a fact-finder, possesses considerable discretion in fixing damages, and its decisiton will be upheld absent clear error. See *Thompson v. National Railroad Passenger Corp.*, 621 F.2d 814,

823 (6th Cir. 1980). However, the trial court, as a threshold requirement, must expose 'the measure of damages and method of computation,' both to inform the litigants of the basis for its findings and to afford the appellate court 'a possibility of intelligent review." In the case at hand, the District Court did not explain the factors it considered when measuring the amount of attorney fees due to Citibank as reimbursement since it failed to apply the standard and factors considered in *Barber v. Kimbrell's Inc.*, 577 F.2d 216 (4th Cir.), *cert. denied*, 439 U.S. 934 (1978) and in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), to decide the amount of attorney fees Citibank was entitled. As a result of this neglect by the District Court, the Fourth Circuit should have disallowed all of the attorney fees and remanded or reduced the attorney fees by applying the factors in those cases. Due to the fact that the Fourth Circuit did not recognize the District Court's neglect in its decision, it is necessary that this court clarify its former decisions addressing attorney fees in the situation as it is presented in this case.

In reviewing the District Court's decision, it is eminently clear that it did not discuss the twelve factors necessary in deciding whether the attorney fees charged by Citibank were reasonable. The court did not follow the guidelines set down by *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir.) *cert. denied*, 439 U.S. 934 (1978) and in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), and, as a result, the Fourth Circuit was incorrect in upholding the District Court's decision. As stated in *Sun Publishing Company, Inc. v. Mecklenburg News, Inc.*, 823 F.2d 818, 819 (4th Cir. 1987), the only time it is not necessary to do a detailed analysis is when attorney fees are denied. From this language, it is clear that whenever attonrey fees are granted, it is necessary for the Court to provide the defendant with an analysis as to why attorney's fees are granted. This conclusion is supported in *Blue v. Bureau of Prisons*, 570

F.2d 529, 531 (5th Cir. 1978). If this Court does not follow in this logic, then courts would never have the obligation to explain its decision and parties would not recognize what is permissible billing practices. The analysis in awarding attorney fees, the factors in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir.), *cert. denied*, 439 U.S. 934 (1978) and *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), is supported in *Sun Publishing Company, Inc. v. Mecklenburg News, Inc.*, 823 F.2d 818, 819 (4th Cir. 1987), "In *Barber*, this court adopted the reasoning of the Fifth Circuit expressed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), that the twelve factors relevant to the determination of reasonable attorneys' fees should be considered by a district court before it rendered an award of attorneys' fees."

CONCLUSION

Petitioners respectfully submits that this Court should grant the certiorari for the reasons set forth herein.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-1430

CITIBANK, N.A.,
Plaintiff-Appellee

versus

BRUNO AND JOAN FIGLIUZZI,
Defendants-Appellants

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria
T. S. Ellis, III, District Judge (CA-86-1432-A)

Argued: October 6, 1989 Decided: December 22, 1989

Before ERVIN, Chief Judge, CHAPMAN, Circuit Judge, and WILLIAMS, United States District Judge for the Eastern District of Virginia, sitting by designation.

Joseph F. Manson, III (MACDOWELL & MANSON, P.C.; William T. Ward on brief) for Appellants. Calvin Hayes Cobb, Jr. (Christian R. Bartholomew, STEPTOE & JOHNSON; David J. Mark, SHEARMAN & STERL-

ING; Michael McGettigan, Craig C. Reilly, MURPHY, MCGETTIGAN & WEST, on brief) for Appellee.

PER CURIAM:

Plaintiff brought this diversity suit to enforce the explicit terms of a guaranty agreement. The lower court granted plaintiff's motion for summary judgment, and awarded monetary damages in its favor in the amount of $2,594,997.81. Defendants now appeal this decision, alleging numerous errors by the district court. We are not persuaded by defendants' protestations of error, and accordingly affirm the judgment below.

I.

This action stems from a $6 million Industrial Revenue Bond ("IRB") transmission entered into on December 22, 1983 by the following parties: the Industrial Development Authority of Stafford County, Virginia ("IDA"); Bruno and Joan Figliuzzi (the "Figliuzzis"); LCS Homes, Inc., a Delaware corporation (LCS"); Citibank, N.A. ("Citibank"); and Madison National Bank ("Madison"). IDA is a regional governmental entity. Bruno Figliuzzi, a self-described multi-millionaire, is an experienced real estate developer-investor and businessman. The Figliuzzis, husband and wife, were the sole shareholders of LCS which, prior to its bankruptcy in 1986, was a manufacturer of prefabricated homes. Citibank and Madison are national banking associations, the former based in New York City and the latter in Washington, D.C. This transaction provided LCS with the financing needed to construct a modular home manufacturing plant in Stafford County.

The IRB deal involved the following steps. The Figliuzzis conveyed 27 acres of land on which the plant was to be situated to IDA, which executed a $6 million Industrial Development Revenue Note (the "Note") secured by a

deed of trust (the "Deed") to the conveyed property and a UCC financing statement. IDA then reconveyed the encumbered land to LCS (who assumed the obligation to repay the Note), and assigned the right of repayment under the Note to Madison (who loaned $6 million to LCS). Meanwhile, Citibank issued to Madison a standby, irrevocable, and transferable letter of credit in the face amount of $6 million (the "Letter of Credit") pursuant to a Reimbursement Agreement (the "Reimbursement Agreement") between Citibank and LCS. Contemporaneously, the Figliuzzis entered into an agreement (the "Guaranty") with Citibank and Madison guaranteeing the obligations of LCS to repay any amount drawn under the Letter of Credit, any amount owing under the Reimbursement Agreement, and any amount due and payable under the Note. To comply with federal bank regulations, Madison later sold its interest in the Note to Citibank, who opted to leave Madison as the beneficiary under the Letter of Credit.

The LCS enterprise was largely unsuccessful. The company eventually defaulted on the Note, and filed for protection against creditors under Chapter 11 of the Bankruptcy Code. Citibank, as payee under the Note, accelerated the Note and demanded payment from the Figliuzzis under the terms of the Guaranty. Upon their refusal, Citibank brought this action to enforce repayment. The district court granted plaintiff's motion for summary judgment on the merits of its claim, holding that Citibank was entitled to both the unpaid balance due on the Note, and the outstanding service fees on the Letter of Credit. Shortly thereafter, the Figliuzzis filed their own Chapter 11 bankruptcy petition. A year later, the district court conducted a trial on the issue of damages, and awarded Citibank the amount of $2,594,997.81, consisting of the principal owed, the default (rather than ordinary) interest on the debt, the Letter of Credit service fees, and attorney's fees. This appeal followed.

II.

In summary, the Figliuzzis have made the following assignments of error. First, the Figliuzzis assert that Citibank should have resorted to the Letter of Credit (an LCS obligation) first before seeking repayment under the Guaranty (the Figliuzzis' obligation). Second, they claim that there is a material issue of fact as to whether Citibank acted in bad faith by "essentially," but not actually, accelerating the Note before LCS's actual default. Third, the Figliuzzis maintain that the default interest rate on the Note constitutes an impermissible penalty. Fourth, they argue that because of Citibank's initial allocation of certain payments in accordance with the pre-default terms of the Note, Citibank is now precluded from reallocating the payments between principal and interest figured at the higher default rate, that Citibank implicitly waived its right to impose the default interest rate, and that the Figliuzzis are somehow discharged from their obligations under the Guaranty. Fifth, the Figliuzzis believe that the district court erred in awarding letter of credit fees to Citibank from the time that Madison sold the Note to Citibank. Sixth, they claim that the district court erred in awarding attorney's fees under the Guaranty. Finally, the Figliuzzis assert that the district court erred in granting Citibank's motion to strike the defendants' jury demand.

III.

This court has held that summary judgment should be granted in cases "where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law. *See Stevens v. Howard D. Johnson Co.*, 181 F.2d 390, 394 (4th Cir. 1950); *Charbonnages De France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979). Summary judgments are reviewed *de novo* on appeal. *See Higgins v. E.I. DuPont De Nemours & Co.*, 863 F.2d 1162, 1166-67 (4th Cir. 1988).

With respect to the determination of damages, "[t]he trial court, as a fact-finder, possesses considerable discretion in fixing damages, and its decision will be upheld absent clear error." *Little Beaver Enterprises v. Humphreys Railways, Inc.*, 719 F.2d 75, 79 (4th Cir. 1983); *Polo Fashions, Inc. v. Craftex, Inc.*, 816 F.2d 145, 149 (4th Cir. 1987) (also applying the clearly erroneous standard).

IV.

In the present case, we conclude that there are no material questions of fact in dispute, that Citibank was entitled to relief based on the Guaranty, that the Figliuzzis' assertions of error by the district court have no merit, and that the lower court's award of damages was not clearly erroneous. Accordingly, the decision of the court below is

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 86-1432-A

CITIBANK, N.A.,
Plaintiff,

v.

BRUNO FIGLIUZZI, *et al.*,
Defendants.

JUDGMENT

Upon consideration of Citibank, N.A.'s claim for damages, the evidence adduced, oral argument by counsel, and for the reasons enunciated by the Court at hearing on January 30, 1989, it is hereby

ORDERED, that Bruno and Joan Figliuzzi are hereby liable for principal in the amount of $1,550,981.22, interest as of January 31, 1989, in the amount of $118,680.88, and letter of credit fees as of January 31, 1989, in the amount of $234,881.07, aggregating $1,904,543.17, and it is hereby further

ORDERED, that Bruno and Joan Figliuzzi are hereby liable for enforcement costs through December 31, 1988, including attorneys' fees in the amount of $690,454.64 in accordance with the following table:

ATTORNEY'S FEES

	Total Incurred	*Allowed*	*Disallowed*
Steptoe & Johnson	$256,078.50	$196,078.50	$ 60,000.00
Shearman & Sterling	367,372.30	352,372.30	15,000.00
Murphy, McGettigan & West	67,387.00	64,187.00	3,200.00
SUBTOTALS	$690,837.80	$612,637.80	$ 78,200.00
EXPENSES			
Steptoe & Johnson			
Travel—local	$ 1,699.20	$ 0	$ 1,699.20
Meals	1,316.06	0	1,316.06
Witnesses	11.125.00	11,125.00	0
Other	32,378.52	32,378.52	0
Shearman & Sterling			
Travel—local	165.00	0	165.00
Travel—U.S.	3,885.70	1,942.85	1,942.85
Overtime, incl. dinners & cabs	4,965.81	0	4,965.81
Multilith & Xerox	39.665.40	19,832.70	19,832.70
Word Processing	7,857.50	0	7,857.50
Proofreaders	2,818.75	0	2,818.75
Meals	308.78	0	308.78
Other	6,514.56	6,514.56	
Murphy, McGettigan & West	6,023.18	6,023.18	0
Subtotals	$113,723.46	$ 77,816.84	$ 40,906.65
TOTALS	$809,561.26	$690,454.64	$119,106.65

Judgment is accordingly entered in favor of Citibank, N.A., against Bruno and Joan Figliuzzi in the amount of $2,594,997.81.

SO ORDERED.

ENTERED this 1st day of February, 1989.

/s/ T.S. Ellis, III
T.S. ELLIS, III
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 86-1432-A

CITIBANK, N.A.,
Plaintiff,

v.

BRUNO FIGLIUZZI, *et al.*,
Defendants.

ORDER

For the reasons stated from the bench, it is hereby ORDERED that:

1. The motion of the plaintiff to dismiss Count V of the counterclaim is granted, the court concluding that there was no fiduciary duty imposed on the plaintiff either because of its actions in this matter or because it simultaneously was the holder of the note and the holder of the letter of credit which it had issued and which secures the note.

2. The motion of the plaintiff to dismiss Count VI of the counterclaim is granted, the court concluding that the acts of the plaintiff in withholding its unconditional consent to the sale of property to Driggs could not be tortious interference since the plaintiff had the right to withhold such unconditional consent, and its failure to perform any understanding reached with the defendants was not a tortious interference with the contract with Driggs.

3. The motion of the plaintiff to dismiss Count VII of the counterclaim is granted, the court concluding that

neither the alleged pressure by the plaintiff on the defendants to sell the property, its withholding of unconditional consent to the transfer of the property, the refusal to agree to the purchase of the note by a bank friendly to the defendants, nor any other activities of the plaintiff constitute a breach of any implied duty of good faith owed the defendants.

4. The motion to plaintiff to dismiss Count VIII of the counterclaim is granted, the court concluding that there was no merging of the note and the letter of credit and no extinguishment of the obligation to pay the fees for the letter of credit, when the letter of credit and the note both became the property of the plaintiff.

5. The affirmative defenses are stricken, counsel for the defendants conceding that all affirmative defenses except Nos. 9 and 14 are subsumed in the rulings on the motions to dismiss the counterclaims. Nos. 9 and 14, which raise the question whether the plaintiff should assert these claims against the principal before resorting to the guarantors, are answered by the bankruptcy of the principal.

6. Summary judgment is awarded in favor of the plaintiff Citibank, N.A., against the defendants Bruno Figliuzzi and Joan Figliuzzi, jointly and severally, for the unpaid balance due on the note and the fees owed for the issuance of the letter of credit, plus enforcement costs, including attorney's fees. The issue of the amount of damages shall be tried on November 2, 1987, unless the parties in the meantime can agree on those damages.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
October 23rd, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 86-1432-A

N.A. CITIBANK,

Plaintiff,

v.

BRUNO FIGLIUZZI, *et al.*,

Defendants.

ORDER

For the reasons stated from the bench, the court finding that the plaintiff has established that the defendants' waiver of trial by jury was informed and voluntary, it is hereby

ORDERED that the motion of the plaintiff to strike the defendants' demand for trial by jury is granted.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
October 9th, 1987